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NO. 73-823

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JAMES F. WALKER,
Petitioner

VS.

STATE OF INDIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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November, 1973

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AUTHORITIES

Cases:

Chimel v. California (1969) 395 U.S. 752, 23 L.Ed.2d 685, 89 S. Ct. 2034.	5, 6, 7

Coolidge v. New Hampshire (1971)
U.S. ___, 29 L.Ed.2d 564,
583, 91 S.Ct. ___ 7, 8

Constitutional Provisions:

Fourth Amendment
Fourteenth Amendment

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28 U.S.C. §1257(3) 2

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TO THE SUPREME COURT OF INDIANA

The petitioner, JAMES F. WALKER, prays that a Writ of Certiorari issue to review the opinion and judgment of the Indiana Court of Appeals rendered in the proceedings on March 7, 1973. A timely petition for re-hearing was denied on May 8, 1973, and a timely petition for transfer to the Supreme Court of Indiana was denied without opinion on August 30, 1973.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals (Appendix A, pp. A-2 to A-22) was rendered on March 7, 1973, and is reported in ____ Ind. App. ___, 293 N.E.2d 35. The petition for re-hearing (Appendix B, pp. B-1 to B-6) was denied without opinion (Appendix B, p. B-7) on May 8, 1973. The petition for transfer to the Supreme Court of Indiana (Appendix C, pp. C-1 to C-3) was denied without opinion (Appendix C, p. C-4) on

August 30, 1973, and is not yet reported.

JURISDICTION

The order or judgment of the Indiana Court of Appeals was rendered on March 7, 1973. A timely petition for re-hearing was filed and denied on May 8, 1973. A timely petition for transfer to the Supreme Court of Indiana was filed and denied without opinion on August 30, 1973. This petition is filed less than 90 days from date of the Supreme Court of Indiana's denial of transfer. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The petitioner was arrested without a warrant on a charge of professional gambling. The evidence against the petitioner was secured by means of a search of the person of the petitioner and of the premises occupied by him. A search warrant for the premises has been suppressed by the trial court as invalid.

The question presented then is whether the evidence secured against the petitioner by means of a warrantless search and seizure was valid as being a necessary incident of an arrest.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

(1) The Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . ."

(2) The Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

On April 5, 1971, several Fort Wayne City Police officers possessing arrest warrants for two men other than the petitioner went to Stewart's Smoke Shop. On arrival they arrested one of the men for

whom they had an arrest warrant. They read the arrested person a search warrant which was later quashed and the evidence suppressed. The officers had earlier observed the other person for whom they had a warrant enter a separate part of the building occupied by Stewart's Smoke Shop which had its own outside entrance. The person already arrested gave the officers a key to it.

The officers left the Smoke Shop and went to the other place and tried the key which did not work. The officers then knocked on the door which was opened by the other person for whom they had an arrest warrant. He stepped back and the officers entered the premises. There was a partitition to block the view of people who stepped in. The officers, however, walked past the partition and observed the petitioner sitting at a table on which there was an adding machine, money and numbers slips, at which time the petitioner was arrested on a charge of professional gambling and searched. The search of the petitioner's person revealed $250.00, some odd change and two numbers slips, along with some miscellaneous items. While the evidence of the items on the table and on the petitioner's person was suppressed as to the invalid search warrant, they were wrongfully admitted into evidence as incident to the petitioner's arrest.

At no time did the petitioner or anyone else give any indication that they had weapons, were going to flee the scene or make any effort to destroy the evidence.

FEDERAL QUESTION RAISED IN STATE COURT

In the Circuit Court of Allen County: At the trial of this cause the federal question raised by this petition was raised by objections to direct testimony, introduction of evidence and in the Motion to Correct Errors. The objection to the testimony and the evidence were specially made on the basis of the Fourth Amendment to the United States Constitution and a citation of the case of Chimel v. California (1969) 89 S.Ct. 2034, 295 U.S.752. The issue was preserved on appeal by the Motion to Correct Errors. (Appendix D, pp. D-2 to D-5)

In the Indiana Court of Appeals: The question was preserved on appeal by filing the above-mentioned Motion to Correct Errors in the Indiana Court of Appeals and argument in the briefs filed with the Court. The matter was further preserved in the petition for re-hearing. (Appendix B, pp. B-1 to B-6)

In the Supreme Court of Indiana: The federal question was preserved in the petitioner's petition to the Supreme Court of Indiana to accept transfer of the case. (Appendix C, pp. C-1 to C-3)

REASONS FOR GRANTING WRIT

The court below has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court. The question involved is whether the search in April, 1971, of a room and person, both out of the view of police officers when they arrested another person some ten (10) feet away at the entrance of

the same store building, was a permissible search under the Fourth Amendment in the light of this Court's holding in Chimel v. California (1969) 395 U.S. 752, 23 L.Ed.2d 685, 89 S. Ct. 2034.

The search was conducted apparently subsequent to the warrant arrest of one James Bates at a storeroom entrance. There were no weapons and there was no destructible evidence in view at the time of the arrest or shortly thereafter. There was no cause for the arresting officers to believe they were in danger, that destructible evidence could be secreted or destroyed or that the arrested person would make any effort whatsoever to flee or otherwise avoid arrest. At the time of the search and arrest the police officers had an invalid search warrant for the premises where the arrest was made.

The Court of Appeals of Indiana in sustaining the trial court's admission into evidence of the money, "numbers slips" and other physical items found in the area behind a partition and some ten (10) feet from the arrested person's area of physical control, cites at length from Chimel v. California, supra, at pages 41 and 42 as follows:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is

entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'--construing that phrase to reach the area from within which he might gain possession of a weapon or destructible evidence."

However, the Indiana Court appears to have applied this holding to a greater extent than permitted by a reasonable interpretation of that cited portion of Chimel, in that the Indiana Court would permit a warrantless search for destructible evidence at any time an arrest is made and in any part of the area where it is made even though there is no probable cause for such a search and even though it goes beyond an appropriately limited search of the arrestee.

The situation presented in this case is closely analogous to the hypothetical statement of facts set forth in footnote 23 in this Court's opinion in Coolidge v. New Hampshire (1971) ___ U.S. ___, 29 L.Ed.2d 564, 583, 91 S.Ct. ___, wherein this Court notes:

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> . . . Where, however, the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee. (Emphasis added.)

In the instant case one of the basic errors of the arresting officers was to obtain their "plain view" of the evidence when they went beyond the limits of the arrestee's person and some ten (10) feet beyond his reach, at a time when they had no cause to look for weapons or destructible evidence, and when they were also operating pursuant to an invalid search warrant.

The existence of the search warrant, albeit unlawful, eliminates any argument of the State of Indiana that the search was inadvertent. The warrant for the search involved the very items of evidence that were found in the store building and on the person of the man arrested without a warrant.

The other limit on the plain view doctrine is that a warrantless search is never constitutionally permissible in the absence of "exigent circumstances". Coolidge v. New Hampshire, supra, at 29 L.Ed.2d 584. In the instant case the evidence is clear that the police officers had ample opportunity to obtain a search warrant because they had, in fact, obtained one several days before. Prior to the trial it was held invalid as being based on "stale facts".

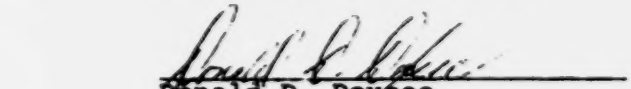
In effect this case represents a clearly maneuvered "plain view" of the evidence sought and obtained by the police and later introduced into evidence against your petitioner.

It is submitted that the admission of this evidence over the objection of counsel, as being in "plain view", and within the permissible scope of a search incident to an arrest, is crucial and prejudicial to petitioner, in that the objects admitted into evidence over objections were the only probative evidence introduced against the defendant and is the only evidence upon which the conviction could be based.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Donald D. Doxsee
Attorney for Petitioner

November 23, 1973

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A62

James F. Walker V. State of Indiana

You are hereby notified that the Indiana Court of Appeals has on this day issued the enclosed Opinion.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 7th day of March, 1973.

(SEAL)

s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JAMES F. WALKER Appellant (Defendant Below)	)	
v.	)	No. 3-972 A 62
STATE OF INDIANA Appellee (Plaintiff Below)	)	

APPEAL FROM THE ALLEN CIRCUIT
COURT, HON. JACK P. DUNTEN,
SPECIAL JUDGE

SHARP, J.

In this case the Appellant, James F. Walker, was chrged by way of affidavit of the offense of professional gambling under I.C. 1971, 35-25-1-2, Ind. Ann. Stat. § 10-2330 (Burns 1972). The Appellant explicitly waived a trial by jury and this case was tried before the trial court alone. The Appellant was found guilty by the trial court and sentenced to the Indiana State Farm for a period of six months and assessed a fine in the sum of $500.00. Motion to Correct Errors was duly filed and overruled resulting in this appeal.

Examining the factual record with the inferences most favorable to the State it is disclosed that on April 5, 1971 three members of the Fort Wayne Police Department along with a member of the Indiana State Police went to 1233 South Lafayette Street

in Fort Wayne, Indiana to execute two arrest warrants for Robert L. Stewart and James Bates, Sr. The arrest warrants were in reference to the offense of professional gambling. These police officers arrived at the above address at approximately 1:00 o'clock P.M. The building at this address faces Lafayette Street with a door to the south portion on the north end of the building and a door to a storeroom or a utility room on the south end of the building. The building is used as a cigarette and cigar store with the business name of Stewart's Smoke Shop. When the police arrived at Stewart's Smoke Shop they knew that James Bates, Sr. was in the south portion of the building and that Robert Stewart was in the store portion of the building. The police officers entered the store building portion of the Smoke Shop building first. They advised Robert L. Stewart that they had a warrant for his arrest, read the warrant to him, advised him of his rights, and asked him for a key to the south portion of the Smoke Shop. Robert L. Stewart was the operator of the business and the owner of the real estate upon which the Smoke Shop was situated. One detective then stayed with Stewart while two other detectives went to the south Door of the Smoke Shop. At this point it is necessary and desirable to consider the precise testimony of officer Lloyd Ellis:

"Q And then, as I understand your testimony, you asked him for a key. Now, what was this key for?

A Well, this key would be for the room that we seen Mr. Bates earlier go into this room.

Q How long prior to your arrival had you seen Mr. Bates go into this room, if you can recall?

A We went there earlier and we were hoping that there would be more people in there, and we had seen Mr. Bates, he was the only one we knew definitely was there, and it was about fifteen or twenty minutes prior before that he arrived, that he went into this back room there.

Q All right, you asked Mr. Stewart, as I understand it, for the key to this other room, is that correct?

A Yes.

Q Did he give it to you?

A Yes, he gave me a key.

Q Then what, if anything, did you do?

A I left Detective Platt there with Mr. Stewart and myself and Detective Snyder went out the door, the Smoke Shop, and went approximately twenty feet to the other door, and I tried the key and it unlocked,

but there was evidently another lock on the inside that had to be unlocked. So I knocked on the door, and after this Mr. Bates came to the door, opened the door and stepped back and I stepped in.

* * * *

Q Was there any conversation that occurred at that time?

A I think I just said to him, 'James Bates,' and he just kind of nodded, and as he did he stepped back into the back part.

Q He stepped back away from you when he saw you?

A Yes, it would be about three steps, as I recall. There's a partition, sort of like a wind-break, as you open the door so that you can't see into the building. You've got to walk in about two steps and then turn about a step or two steps and you're behind that partition. He stepped back toward, back by the partition.

Q What, if anything, did you do at that time?

A I stepped back with him.

Q And what, if anything, did you observe at that time?

A Well, as soon as I stepped back past this partition, wind-break, or whatever you want to call it, I observed the defendant Mr. Walker sitting at a table with the adding machine and the number slips, and...

* * * *

Q Detective Ellis, with regard to number slips, can you tell the court what you mean by number slips?

A Well, number slips are any type of paper or a slip of paper, it can be any form, with a combination of three numbers crossed, or they can be boxed or squared, with a dash on them, there will be a figure such as a $1.50, and these are bets that are made on the stock market quotations, advances, declines and unchanged for the day. And also you will have a number or code number for the writer who will be on this slip and initials of the person purchasing this slip, and down at the bottom will be the total amount bet on the slip; there will be a date on this slip. These are slips that are used in the numbers.

Q You mean the people purchase these slips with a number on them for money?

A Right.

Q And this is wagering, correct?

A Yes, wagering.

Q All right, now, prior to April 5, 1971, had you occasion to see or personally examine number slips, were you familiar with them, in other words?

A Yes, we have made purchases on these number slips.

Q And, as a matter of fact, prior to April 5, 1971, had you been engaged in investigation of the numbers racket?

A Yes, sir.

Q In the course of that investigation, did you have occasion to see or familiarize yourself with number slips?

A Yes, sir.

Q And the numbers game as it was played at that particular time?

A Yes, sir.

Q And are you telling the court, from your experience, that the slips that you observed on the table in the premises at 1233 South Lafayette Street were, in your opinion, number slips?

A Yes, sir, they were number slips.

Q All right, would you continue, please, then, to relate to the court what you observed on your entry into this side room?

A Well, as I came around the side there, I looked over, I looked around the whole room and as I looked over, I saw only one other person there in this back room who was James Walker, and there was two round tables sitting side by side and these slips were stacked in different stacks and they had an adding machine tape on with a total, and they were stapled together - the slips were stapled. There was stacks of money that had been stacked into piles, and there was some change there, I believe, and an adding machine and some scratch paids (sic) with figures on the table. These were sitting directly in front of where Mr. Walker was sitting.

Q Now, as I understand it, he was seated at one of these round tables?

A Yes,sir.

Q And what, if anything, did he do upon your entry into the room?

A Nothing. He just leaned back in his chair and sat there.

* * * *

Q And before you entered this room and observed the defendant and the money and number slips on the table, as you have testified, did you conduct any search of that room?

A Of the back room?

Q Yes.

A No, I hadn't conducted any search until after I placed Mr. Bates under arrest, read the warrant to him and advised Mr. Walker he was under arrest on a preliminary charge of professional gambling. I searched both subjects.

Q Did you have to move anything or uncover anything to see these number slips, money, adding machine or the defendant?

A No, before we picked anything up or moved anything, we called for a photographer and had him photograph it just as we found it when we walked in.

* * * *

Q All right, now you've stated that you placed Mr. Walker under arrest at that time for a preliminary charge of

professional gambling, is that correct?

A That's right.

Q What, if anything, did you do at that time?

A Well, I searched the subject.

Q What, if anything, did you find?

A I found in his pockets, his pants pocket, I found $250 and some odd change and two slips that I identified myself as being number slips and some other personal papers, car registration and some odds and ends that were in his jacket, and things like this."

On cross-examination by the Appellant's counsel, Officer Ellis testified, in part, as follows:

Q Officer, when you first entered the building, would you be able to observe these two tables and the objects shown here by looking through the front door?

A From outside, standing on the sidewalk?

Q Without going inside the room?

A No, you would have to... You couldn't see it standing in the doorway. This wall here, that you see here, where these two tables are against it, is a thin partition, and the

doorway is about two foot, and you have to step over and then up, and this is where Mr. Bates stepped. He reached around this corner and unlocked this door, and I stepped up here to come up where he was standing and then I look over to the side and there was these two tables (referring to States's Exhibit No. 1).

Q But you have to walk inside the building to get the view of these tables, is that right?

A Yes, you have to go inside the building approximately two foot.

Q So that simply a plain glance through the door would not reveal those tables?

A No, you couldn't see them from standing in the doorway.

Q Now, where was Mr. Bates in relation to those tables when you first observed him?

A When I first observed Mr. Bates, he came around that corner of that partition, reached over, unlocked the door, and there is a small step about the size of this (indicating) to step up and, say, like the door was here. He unlocked it and I stepped around about this far (indicating) and he backed up -- he backed up past that partition and I backed up to him, and there would be the

tables. He was standing right at the edge of the table, actually, off to the side.

Q All right, did Mr. Bates do or say anything to you at that time?

A No he didn't say anything. I just told him I had a warrant for his arrest, and as I come up to read it to him, all I Had to do was turn over to the side and there was the two tables sitting there."

The trial court also had before it photographs to supplement the oral testimony of the police officers in addition to the evidence introduced from the person of the Appellant and from the tops of the two tables in question. From the evidence it is clearly inferable that the so-called "windbreak" in the partition in question formed an entryway into and was a part of the room in which Bates and the Appellant were located at the time of their arrests. It is also clearly inferable that all of the events which transpired after the entry of the two police officers with the arrest warrant for Bates occurred inside the same room. When Bates and the police took two steps from the entryway they did not enter a different room but only completed their entry into the same room. On this question the trial court had a choice between the testimony of the police officers and of Bates. The evidence clearly infers that we are here concerned with one room not two. The only evidence in any way contrary to the testimony of the police officers was given on behalf of the Appellant by said James Bates, Sr. whose credibility was challenged by impeaching evidence.

In order to determine this appeal we must consider the following issues:

1. Whether some of the items of evidence introduced were incident to a legal arrest and whether they were in plain view of the arresting officer when he arrested the Appellant without a warrant.

2. Whether there was probable cause to arrest the Appellant for the offense of professional gambling without an arrest warrant.

3. Whether the items taken from the person of the Appellant constituted a search of his person incident to a valid arrest.

4. Whether all of the evidence presented was sufficient to sustain a conviction of guilty of professional gambling.

I

For our purposes here we will assume that the arrest warrant for Bates was a valid one and was sufficient to authorize the presence of the two police officers in this particular room at this particular time for the purpose of properly executing such arrest warrant. I.C. 1971, 35-1-19-6, Ind. Ann. Stat. § 9-1009 (Burns 1972), provides as follows:

> "To make an arrest in criminal actions the officer may break open any outer or inner door or window of a dwelling house or any other building or inclosure to execute the warrant, if, after notice of his authority and purpose, he be refused admittance."

In McGregor v. State, 200 Ind. 496, 163 N.E. 596 (1928), the police officers had gone into a public store maintained by the defendant to apprehend a law violator and finding the door of an adjoining room open were authorized to enter to make an arrest and if necessary, could have broken open the door.

Even under the testimony offered by Bates under the above statutory and case authorities the police officers were properly in the room with Bates and the Appellant for the purpose of executing a valid arrest warrant.

We must next turn to the question of probable cause for the arrest of the Appellant on the charge of professional gambling without a warrant. At the time of the arrest of Bates pursuant to a valid arrest warrant, in the same room, in plain view of the arresting officer was the Appellant sitting in front of two tables. The photographs of these two tables as they appeared at that time were placed into evidence. We have carefully examined these photographs in the transcript. On these tables were an electric adding machine plugged into an electric wall socket, on the table by the adding machine were piles of so-called "number slips". There were adding machine tapes stapled to the stacks of number slips, and there were stacks of currency and some small change. There were also scratch pads with figures and several ball point pens, ashtrays and matches. All of these were directly in front of the Appellant as he sat facing these items on these two small round tables which had been pushed together. These number slips were introduced into evidence and had been carefully examined by this court.

In Smith v. State, ___ Ind. ___, 271 N.E. 2d 133, 136 (1971), our Supreme Court stated:

> "The test for probable cause to make an arrest is whether at the time of the arrest the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee had committed or was committing an offense." (citing numerous authorities)

In this case the police officers had information that a numbers gambling activity was operating out of the premises of Stewart's Smoke Shop, that Bates, for whom an arrest warrant had been issued, was a known gambler, there were number slips and currency in piles with adding machine totals connected with the piles, an electric adding machine in use in close proximity to this Appellant at the precise time of his arrest. Certainly under all of these circumstances there was probable cause for the arrest of the Appellant.

II

Having concluded that there was sufficient probable cause for his arrest we must next determine whether or not the items of evidence in plain view on the two tables in question which were immediately in front of the Appellant and the items taken from his person at that time by the arresting police officers were proberly (sic) admitted into evidence.

In Harris v. United States, 390 U.S. 234, 236 (1968), an unanimous Supreme Court of the United States, with one justice not participating and with Justice Douglas concurring separately, stated:

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. Ker v. California, 374 U.S. 23, 42-43 (1963); United States v. Lee, 274 U.S. 559 (1927); Hester v. United States, 265 U.S. 57 (1924)."

Our Supreme Court followed Harris in Alcorn v. State, ____ Ind. ____, 265 N.E. 2d 413, 416 (1970), where it said:

> "The word 'search' connotes uncovering that which is hidden, prying into hidden places for that which is concealed. It is not a search to observe what is open to view."

See also, Presley v. State, ___ Ind. ___, 284 N.E. 2d 526 (1972); Griffin v. State, ___ Ind. ___, 285 N.E. 644 (1972); and Luckett v. State, ___ Ind. ___, 284 N.E. 2d 738 (1972).

Harris v. United States and the above authorities from the Indiana Supreme Court are sufficient to authorize the introduction and consideration into evidence of the items on the top of the two tables which were in plain view of the arresting officer at the time of their arrest of the Appellant.

III.

The next question relates to the $250 in currency and the two number slips which were taken from the clothing on the Appellant's person at the time and place of his arrest by the arresting police officers.

In Chimel v. California, 395 U.S. 752, 762 (1969), Mr. Justice Stewart, speaking for a majority of the Supreme Court, stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his excape (sic). Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the

arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'--construing that phrase to reach the area from within which he might gain possession of a weapon or destructible evidence."

In Chimel there was no basic disagreement between the majority and the dissenters over the question of a search of the person at the time and incident to a valid arrest. Likewise, in Paxton v. State, ___ Ind. ___, 263 N.E. 2d 636 (1970), there was no basic difference in our own Supreme Court when it followed and applied Chimel. In Paxton as in Chimel both the majority and dissenting opinions were premised on the accepted propostion (sic) that an arresting police officer may, incident to a valid arrest, search the person and the clothing of the arrestee. The Appellant in this case would have us interpret Chimel and Paxton as limiting such search to situations in which there is a question of the safety of the arresting officer. The plain language in Chimel is quite clear that there is an additional and equal reason for such a search and that is to "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction".

Our Supreme Court has had the occasion to follow and apply the rules relating to search incident to a legal arrest on several recent cases. See Sanchez v. State, ___ Ind. ___, 267 N.E. 2d 374 (1971); Farrie v. State, ___ Ind. ___, 266 N.E. 212 (sic) (1971); and Luckett v. State, ___ Ind. ___, 284 N.E. 2d 738 (1972).

The search of the Appellant's person in this case was constitutionally permissible and the products of that search were not constitutionally excludable from evidence.

IV.

Reviewing an allegation that a verdict in a criminal case is contrary to law and is not sustained by sufficient evidence, we will not weigh evidence or resolve the credibilitiy of witnesses. Instead, this court will look to that evidence most favorable to the State and the reasonable inferences to be drawn therefrom and the conviction will be affirmed, if from that viewpoint, there is substantial evidence of probative value from which the trier of facts could reasonably infer that the Appellant was guilty beyond a reasonable doubt for the crime for which he was reasonably convicted. See Riner v. State, ___ Ind. ___, 281 N.E. 2d 815 (1972), Buise v. State, ___ Ind. ___, 281 N.E. 2d 93 (1972); and McKinley v. State, ___ Ind. ___, 281 N.E. 2d 91 (1972).

It is also well established that a conviction may be sustained even though it is based wholly on circumstantial evidence. See Miller v. State, ___ Ind. ___, 285 N.E. 2d 843 (1972), and Vaughn v. State, ___ Ind. ___, 266 N.E. 2d 219 (1971).

Recently in McAfee v. State, ___ Ind. ___, 291 N.E. 2d 554, 556 (1972), Justice Prentice stated:

"The evidence in this case is circumstantial, but conviction may be sustained by circumstantial evidence alone, and we can not say that, based on that evidence, although only circumstantial, and the reasonable inferences to be drawn therefrom the evidence is insufficient as a matter of law. Where the sufficiency of circumstantial evidence is in question, we examine it carefully, not for the purpose of finding whether or not it is adequate to overcome every reasonable hypothesis of innocence, but with the view of deciding whether an inference may be reasonably drawn therefrom tending to support the finding of the trial court. Stice v. State (1950), 228 Ind. 144, 89 N.E. 2d 915; Petillo v. State (1950), 228 Ind. 97, 89 N.E. 2d 623."

In this case there was a valid arrest warrant for a known gambler on the charge of professional gambling who was known to be at this particular location. The Appellant was found in a room with two sets of locks so as to prevent persons entering without the permission of those inside the room. The inference is clearly permissible that the sole and only purpose of this particular room was the nerve center of a numbers professsional gambling operation which is clearly within the definition of professional gambling as found in I.C. 1971, 35-25-1-1, Ind. Ann. Stat. §10-2330 (Burns 1972). That evidence clearly permitted the trier of fact to preclude any hypothesis that this room and its occupants were engaged in any "social pastime" as defined in Peachey v. Boswell, 240 Ind. 604, 167 N.E. 2d 48 (1960). Even though so-called

"policy slips" and "number slips" may not be gambling devices in order to sustain a conviction for possession thereof under the authority of Brooks v. State, 249 Ind. 291, 231 N.E. 2d 816 (1967), the evidence of their possession taken together with all of the other evidence here is relevant to the total circumstances which the trier of fact could consider in order to determine a case involving the charge of of(sic) professional gambling. Here we have much more than a case of mere presence at the scene of a crime. We find the Appellant at the nerve center of a gambling numbers operation in the backroom of a public business establishment which room has a door with two separate locks, one for entry from the outside and one for the inside only. The evidence clearly excludes the hypothesis that this was a place for social respite. We find the Appellant at such time and place under circumstances that clearly point to his participation in this professional gambling operation. When the contents of his pockets are compared with the evidence in plain view the trier of fact, in this case an experienced and highly qualified trial judge, could properly have exluded any reasonable hypothesis of innocence under the above quoted statement from McAfee. While possession of the items in Appellant's pockets would not be a crim, (sic) the possession of these items in the total circumstantial context of this case, is sufficient to support a conviction of professional gambiling(sic). The evidence clearly supports the conclusion that Appellant was a participant in such professional gambling operation.

We find no reversible error in the record here and the conviction is affirmed.

Hoffman, C. J. and Staton, J. concur.

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JAMES F. WALKER, Appellant (Defendant below)	)	
vs.	)	NO. 3-972A62
STATE OF INDIANA, Appellee (Plaintiff below)	)	

APPELLANT'S PETITION FOR REHEARING

The Appellant petitions the Court to grant a rehearing in the above-entitled cause.

The Appellant respectfully represents that the Court erred in its opinion and decision in the following respects:

1. In holding that the arresting police officers had a right to be inside a particular room at the time they were executing a valid arrest warrant and this fact justified their examining the room without a search warrant and, thereafter, seizing and introducing as evidence what they observed in the room.

This decision and holding is erroneous because the police officers could reasonably have read the warrant to and taken the party arrested into custody without entering the room where the evidence was observed. There was no evidence presented that the arresting officers were required to enter the room, walk past a partition or "wind-break" in the entry way in order to make

the arrest nor did they have reason to suspect that they were in danger from acts of the party being arrested or that destructible evidence relating to "professional gambling" was within the suspect's immediate control.

2. In holding that the evidence was sufficient to show that the police officers had probable cause to arrest the defendant as a "professional gambler".

This decision and holding is erroneous because the Court draws unreasonable inferences or finds facts that are not in evidence. Contrary to the Court's finding there was no evidence that:

> . . . the police officers had information that a numbers gambling activity was operating out of the premises of Stewart's Smoke Shop, that Bates, for whom an arrest warrant had been issued, was a known gambler . . .

The balance of the presumed evidence upon which the Court finds probable cause for the arrest was obtained as the result of an illegal search and seizure and was nothing more than defendant was sitting in front of a table in "close proximity" to an adding machine, currency, and number slips, which in and of itself is not a crime or evidence of any crime in the State of Indiana.

In holding that the evidence seized in the storeroom and introduced against defendant by the State was in "plain view" of the police officers and consequently no search warrant was required.

This decision and holding is erroneous because the police officers when they observed the evidence were not in a place where they constitutionally had a right to be nor was their observance of the evidence inadvertent, permitted by consent, or caused by their pursuing some other valid police activity unrelated to the examination of the room for evidence of "professional gambling".

3. In holding the search of Appellant's person was constitutionally permissible and the products of the search were not constitutionally excludable from the evidence.

This decision and holding is erroneous because in the instant case the police had no probable cause to believe or reason to suspect that they were in danger from a weapon that defendant had on his person or within his reach or that there was destructible evidence relating to "professionable gambling" on his person or within his immediate reach or control.

4. In holding that the evidence in this case, although circumstantial, was sufficient to support the finding of Appellant's guilt because the facts in evidence supported a reasonable inference "tending to support" the guilty finding of the trial court.

This decision and holding is erroneous because the only facts in this case insofar as the defendant-appellant is concerned are that he was sitting in "close proximity" to a table with number slips, money and an adding machine on it, in a small storeroom

with another man who had just been arrested by warrant for professional gambling. There was no evidence that the storeroom was the "nerve center of a gambling operation in the backroom of a public business establishment . . ." or that it had "two separate locks", and even if such evidence were in the case this would not be sufficient to reasonably establish anything other than the fact that defendant was sitting in such a place; and this is clearly not a crime. There is not one shred of evidence that defendant was personally engaged in the operation of the presumed gambling operation. Active participation in a crime or conspiracy cannot be inferred from mere presence at the scene thereof. This lack of evidence cannot be cured by the fact that an "experienced and highly qualified trial judge" observed the evidence and excluded any reasonable hypothesis of innocence. The experience and qualifications of the trier of fact cannot supply factual deficiencies in the evidence.

5. That the opinion of this Court contravenes a ruling precedent of the Supreme Court as stated in its opinion in the case of Paxton v. State (1970), ___ Ind. ___, 263 N.E.2d 636, which ruling precedent is that a search incident to an arrest would not be valid unless the arresting officer had reason to suspect that he was in danger or there was probable cause to believe there was destructible evidence relating to the crime within the suspect's immediate control or on his person.

That said ruling precedent was contravened by the Court in this case as shown by the following language contained in the opinion of this Court:

> The Appellant in this case would have us interpret Chimel and Paxton as limiting such search to situations in which there is a question of the safety of the arresting officer. The plain language in Chimel is quite clear that there is an additional and equal reason for such a search and that is to "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction".
>
> * * *
>
> The search of the Appellant's person in this case was constitutionally permissible and the products of that search were not constitutionally excludable from evidence.

6. That the opinion of this Court contravenes a ruling precedent of the Supreme Court as stated in its opinion in the case of Alcorn v. State (1970) ___ Ind. ___, 265 N.E.2d 413, which ruling precedent is that when evidence falls in the plain view of an officer who has a right to be in the position to have that view it is subject to seizure and may be introduced in evidence.

That said ruling precedent was contravened by the Court in this case as shown by the following language contained in the opinion of this Court:

For our purposes here we will assume the arrest warrant for Bates was a valid one and was sufficient to authorize the presence of the two police officers in this particular room at this particular time for the purpose of properly executing such arrest warrant.

It was clear from the Court's opinion that the police officers at the door of the room where they could have arrested the suspect could not see by a plain glance the evidence in the room because there was a thin partition or "windbreak" which blocked their view. It was only after the officers entered the doorway, came into the room and looked around the partition that the evidence came within their "plain view". See pages 3, 4 and 6 of the Court's opinion for the specific evidence relied upon by the Court.

The Court then quoted Alcorn and indicated that because the officers had not uncovered that which was hidden, or pried into places for things that were concealed there was no search and ipso facto the evidence simply fell into their view, even though they looked and sought out the evidence in a room where they were not required to be when they arrested the suspect.

s/ Ralph R. Blume
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STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A62

James F. Walker vs. State of Indiana

You are hereby notified that the Court of Appeals has on this day denied appellants petition for rehearing. George B. Hoffman, Jr., C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 8th day of May, 1973.

(SEAL)

s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

IN THE
SUPREME COURT OF INDIANA

JAMES F. WALKER, Appellant (Defendant below)	)	
vs.	)	NO. 3-972A62
STATE OF INDIANA, Appellee (Plaintiff below)	)	

APPELLANT'S PETITION FOR TRANSFER

The Appellant petitions the Supreme Court to transfer this cause to said Supreme Court for review and in support of his petition states the following pursuant to Appellate Rule 11(B)(1) and (2):

1. The Indiana Court of Appeals decided this case with a written opinion filed on the 7th day of March, 1973.

2. The decision of the Court of Appeals was against this appellant.

3. That a petition for rehearing was filed with the Court of Appeals in time on March 23, 1973, and that a reharing was denied on the 8th day of May, 1973.

4. That the decision of the Court of Appeals is in error in that it contravenes rulings precedent of this Court as follows:

a. The decision of the Indiana Court of Appeals contravenes a ruling precedent of this Court as stated in its opinion in the case of Paxton v. State (1970) ___ Ind. ___, 263 N.E.2d 636, in which this Court held that a search incident to an arrest would be valid only if the arresting officer had probable cause or reason to suspect that he was in personal danger or that he he had probable cause to believe there was destructible evidence relating to the crime for which the arrest was made within the suspect's immediate control or on his person. Contrary to this precedent the Indiana Court of Appeals has ruled that an arrestee's person may be searched at any time, regardless of whether or not the arresting officer had reasonable cause, to:

> . . . search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

b. The decision of the Indiana Court of Appeals contravenes a ruling precedent of this Court as stated in its opinion in the case of Alcorn v. State (1970) ___ Ind. ___, 265 N.E.2d

413, in which this Court held that when evidence falls in the plain view of an officer, who is then in a rightful and reasonable position to have that view, it is subject to seizure and may be introduced in evidence. Contrary to this precedent the Indiana Court of Appeals has ruled that any view of evidence, whether rightful, reasonable or wrongful is valid unless the officers were actually required to uncover that which was hidden or pry into places for things that were concealed, there is no "search" and consequently no constitutional bar to its admission into evidence as being the fruit of an illegal "search".

s/ Ralph R. Blume
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Attorney for Appellant-
Defendant

STATE OF INDIANA
CLERK OF THE SUPREME COURT
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217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A62

James F. Walker V. State

You are hereby notified that the Insiana (sic) Supreme Court has on this day Denied Appellants Petition to Transfer without Opinion. Hunter, Acting C. J. 8/30/73

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 31st. day of August, 1973.

(SEAL)

s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

STATE OF INDIANA) IN THE ALLEN CIRCUIT COURT
)SS:
COUNTY OF ALLEN) CAUSE NO. 14651

STATE OF INDIANA

VS.

JAMES WALKER

SENTENCE

[After a finding of guilty] It is, therefore, ordered, adjudged and decreed by the Court that the defendant, James F. Walker, is guilty of the offense of Professional Gambling, as charged in the affidavit, and that he be and he is hereby sentenced to the Indiana State Farm for a period of six (6) months, and that he be fined in the penal sum of Five Hundred ($500.00) Dollars, and that he pay and satisfy the costs herein taxed.

s/ Jack P. Dunten
Special Judge

STATE OF INDIANA) IN THE ALLEN CIRCUIT COURT
)SS:
COUNTY OF ALLEN) CAUSE NO. 14651

STATE OF INDIANA

VS.

JAMES WALKER

DEFENDANT'S MOTION TO CORRECT ERRORS

Comes now the Defendant and files herein his Motion to Correct Errors pursuant to Trial Rule 59 as follows:

1. The decision of the Court is not supported by sufficient evidence upon all necessary elements of the crime of "professional gambling" as charged in the Affidavit filed herein, in the following particulars:

A. The State failed to prove by any evidence of probative value that the Defendant:

(1) Knowingly engaged in gambling;

(2) Accepted or offered to accept money or other things of value risked in gambling;

(3) Accepted money or other things for profit;

(4) Affected the public by any activity on his part;

(5) Owned, controlled, and maintained gambling lotteries or numbers games or sold chances therein.

B. The State failed to present evidence in this case, one based solely on circumstantial evidence, which was so conclusive in character or which pointed so surely and unerringly to the guilt of the Defendant that every reasonable hypothesis of innocence was excluded.

2. Uncorrected errors of law occurred and were properly raised in the proceedings at the trial, in that:

A. The Court admitted into evidence certain monies, paper slips, a photograph of a table with an adding machine, paper slips, and other miscellaneous items on it over the timely objection of the Defendant that such evidence was obtained as the result of an unconstitutional search without a valid search warrant having been first obtained.

B. Defendant was not released from custody although he was arrested without a warrant first having been obtained and without probable cause.

STATEMENT OF FACTS AND GROUNDS

1. As to the specification of error in Paragraphs 1A and 1B above, the facts and grounds are:

The only evidence introduced by the State during the course of the trial involved a single isolated incident in which a police officer

during an illegal search observed the Defendant seated at a table and one other person, a man standing near a doorway, in a small storeroom occupied by a table on which there was an adding machine, some paper money and a small quantity of paper slips on which certain figures had been written. This evidence is clearly not sufficient to prove that Defendant was engaged in professional gambling as alleged in the Affidavit filed in this cause; and is not so conclusive in character nor does it so surely and unerringly point to the guilt of the Defendant as to exclude every reasonable hypothesis of Defendant's innocence in this pure case of circumstantial evidence.

2. As the specification of error in Paragraph 2A above, the facts and grounds are:

During the course of the trial of this cause to the Court, the Court over the timely objection of the Defendant, admitted into evidence certain exhibits and a photograph which the police officer had obtained by a search without a valid search warrant and without probable cause contrary to the Defendant's Fourth Amendment right under the Federal Constitution and Article 1, section 11 rights under the Indiana Constitution to be secure against unreasonable searches and seizures.

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3. As to the specification of error Paragraph 2B above, the facts and grounds

Defendant was arrested illegally because there was no warrant issued for his arrest, and there was no probable cause for such arrest as the evidence relied on for the arrest was obtained as the result of an illegal search.

WHEREFORE, Defendant prays that this rt grant Defendant's Motion to Correct ors, enter an Order of Dismissal, and er his immediate release from custody.

BLUME, WYNEKEN,LEVINE & CLIFFORD

By_____
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